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Supreme Court of the United States
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No. 315.

Filed April 17, 1899.

The Hancock National Bank, Plaintiff in Error,

v.

Jonathan B. Farnum.

In Error to the Supreme Court of the State of Rhode Island.

BRIEF FOR DEFENDANT.

STEPHEN O. EDWARDS,
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JONATHAN B. FARNUM.

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STATEMENT.

This case comes before the court on a writ of error to the Supreme Court of Rhode Island, the assignments of error being, in substance, that the judgment of the Rhode Island court refuses to give full faith and credit to certain public acts, records and judicial proceedings of the State of Kansas.

The case in the Rhode Island Court was an action of assumpsit by a judgment creditor of a Kansas corporation against a Rhode Island stockholder therein, to subject the defendant to a personal liability under a statute of Kansas. The plaintiff in error was the plaintiff below; the case came before the State court on demurrer to the declaration; and the State court sustained the demurrer.

The declaration alleges that by virtue of a statute of Kansas[1], and a provision of the Constitution of that State[2], a creditor who recovers judgment against a corporation, is entitled, after execution thereon has been returned unsatisfied, to proceed by action against any of the stockholders, to charge them, to a certain limited extent, with the amount of the judgment; that the stockholder's liability, as construed by the Kansas court, is a contractual liability, arising on the contract of subscription to the capital stock; that the liability is several; and that an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stock-

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[1]The statute referred to is Section 1192 of the General Statutes of Kansas, which reads as follows:

1192. If any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of the stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment.

[2]The provision referred to is Article 12, Section 2, as follows:

SEC. 2. Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations nor corporations for religious or charitable purposes.

holder. The declaration further avers that the plaintiff has recovered judgment, in the Circuit Court of the United States for the District of Kansas, against the Commonwealth Loan and Trust Company, a Kansas corporation, and that execution thereon has been returned unsatisfied; that the defendant is a stockholder in the corporation mentioned; that the Kansas statute, as construed, imposes a liability upon him to the plaintiff; "and that full faith and credit should be given in this State and the courts thereof, to said public acts, records, and judicial proceedings of the State of Kansas, and to the judicial construction of such laws, acts, and records, by the Supreme Court of said Kansas, which is the highest court of said State, as required by Article IV, Section 1, of the Constitution of the United States[1] and by Section 905 of the Revised Statutes of the United States.[2]"

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[1] As follows:

SECTION 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

[2] As follows:

SEC. 905. The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.

Annexed to the declaration are exhibits, setting out the alleged statute and section of the Constitution of Kansas, and referring to certain decisions in the Supreme Court of that State.

The Rhode Island court, in sustaining the defendant's demurrer to this declaration, held that even if the Kansas statute was regarded by the court in that State as constituting a contract between stockholder and creditor, this opinion would not be a judicial proceeding to which full faith and credit must be given, and would not establish, as a matter of pleading in this declaration, the fact of a contract by the defendant in Kansas by virtue of the statute. The court pointed out that such an opinion would be a decision on general legal principles, and not an interpretation of the statute itself; and observed that "opinions of courts are not judgments, and although a court, in the interpretation of the statutes of its own State, will be followed by other courts, there is no rule of comity or law that a court should be followed when its opinion is given simply upon its interpretation of general legal principles. Still less would an opinion be binding when it is not a decision, but merely a dictum."

Having thus decided that the Constitution and laws of the United States did not compel it to enforce the liability created by the statute in question, the court held, upon the authority of *Sayles* v. *Bates*, 15 R. I., 342, that the liability was not contractual; and upon the authority *O'Reilly* v. *New York etc. R. Co.*, 16 R. I., 388, that the statute imposing it was not enforceable in Rhode Island because not substantially similar to Rhode Island statutory provisions on the same subject.

The court might have added that the Kansas statute is directly opposed to the policy of the law of Rhode Island in an important particular; for while the Rhode Island statute,

(General Laws, R. I., 1896, c. 180, s. 22[1]), expressly provides that the stockholder, when sued for the debt of the corporation, may avail himself of any defence which the corporation might have made in the original action, no such right is reserved to the stockholder under the Kansas statute. The law of Rhode Island on this point was formerly like that of Kansas (See General Statutes, R. I. 1872, c. 142, s. 20[2]). But this statute was expressly repealed by Public Laws, 1877, c. 600, which enacted the present law (see note 1). It may therefore be taken to be the deliberately settled policy of Rhode Island law (in direct opposition to the law of Kansas) that a stockholder shall not be liable on a judgment obtained against the corporation until he has had an opportunity to contest the claim upon which the judgment was founded. And no foreign statute which withholds from the stockholder such opportunity can be enforced in Rhode Island, without contravening the policy of Rhode Island laws.

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[1] As follows:

SEC. 22. All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation, and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered.

[2] As follows:

SEC. 20. Whenever the stockholders of any manufacturing company shall be liable, by the provisions of this chapter, to pay the debts of such company, or any part thereof, their persons and property may be taken therefor on any writ of attachment or execution, issued against the company for such debt, in the same manner as on writs and executions issued against them for their individual debts.

The writ of error contains five formal assignments of error[1], but these may all be embraced under the general proposition that the judgment of the Supreme Court of Rhode Island refuses to give full faith and credit to the public acts, records and judicial proceedings of the State of Kansas.

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[1] As follows:

1. That in said suit there was drawn in question the construction of a statute of the United States, to wit, section 905 of the Revised Statutes of the United States, and the decision was against the title, right, privilege, and immunity of the plaintiff in error specially set up and claimed under such statutes, to wit, said section 905 of the Revised Statutes of the United States.

2. That in said suit there was brought in question the Constitution of the United States, to wit, article 4, section 1, of the Constitution of the United States, and the decision was against the title, right, privilege and immunity of the plaintiff in error specially set up and claimed under the Constitution, to wit, said article 4, section 1, of the Constitution of the United States.

3. That the State Court of Rhode Island decided, against the contention of the plaintiff in error, that it would not give full faith and credit to paragraph 1192 of the General Statutes of the State of Kansas, and to the judicial construction thereof by the highest courts of said State, as required by article 4, section 1, of the Constitution of the United States, and by section 905 of the Revised Statutes of the United States, although their attention was drawn thereto, and thereby defeated the right of the plaintiff in error to enforce by appropriate action, its claim against the said Farnum, as aforesaid.

4. That the Supreme Court of Rhode Island decided, against the contention of the plaintiff in error, that it would not give full faith and credit to the judicial proceedings of the Circuit Court of the United States of America for the district of Kansas, as set forth in the pleadings, as required by article

POINTS OF LAW.

I.

The only question before this court is whether the judgment of the Supreme Court of Rhode Island refuses to give full faith and credit to the public acts, records and judicial proceedings of the State of Kansas.

The general question of the *comity* and *justice* of enforcing or refusing to enforce a stockholder's liability under the statute of another State, is, of course, not open to consideration on this record. Whether, therefore, this court would concur in the State court's view of that question, or whether it has already taken the opposite view; and whether the State court's view is, as Judge Thompson declares (Liability of Stockholders § 86, p. 96), narrow and "tribal," or, on the other hand is, as the Rhode Island court believes, "founded in reason" as well as supported by earlier decisions in that State,—seems to be wholly unimportant here. The only

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4, section 1, of the Constitution of the United States, and by section 905 of the Revised Statutes of the United States, although their attention was drawn thereto, and thereby defeated the right of the plaintiff in error to enforce by appropriate action its claim against said Farnum, as aforesaid.

5. The Supreme Court of the State of Rhode Island erred in the decision rendered in this case in failing to give full faith and credit to the laws and constitution of the State of Kansas which were presented in the pleadings, in failing to give full faith and credit to the judicial construction of such laws by the highest court of the State of Kansas, and in failing to give full faith and credit to the judicial proceedings of the Circuit Court of the United States of America for the district of Kansas, as set forth in the pleadings.

Federal question, and therefore the only question before this court,

Murdock v. *City of Memphis*, 20 Wallace, 590,

is whether the Rhode Island court was under a *constitutional obligation* to enforce this Kansas statute on the facts alleged in the plaintiff's declaration; in other words, whether, in refusing to sustain this declaration, the court refused to give full faith and credit to the public acts, records and judicial proceedings of the State of Kansas.

II.

The judgment of the Supreme Court of Rhode Island does not refuse to give full faith and credit to the judicial proceedings of the State of Kansas.

(*a*) THE REFUSAL OF THE RHODE ISLAND COURT TO FOLLOW THE OPINION OF THE KANSAS COURT AS TO THE NATURE OF THE LIABILITY IMPOSED BY SECTION 1192 OF THE KANSAS STATUTES, IS NOT A REFUSAL TO GIVE FULL FAITH AND CREDIT TO THE JUDICIAL PROCEEDINGS OF KANSAS.

This opinion of the Kansas court, relied upon by the plaintiff and made a part of the declaration in the case at bar, was rendered in a case in which neither the parties here, nor the corporation in which the present defendant is a stockholder, were in any way concerned. Moreover the decision of the case in which it was rendered, did not call for an opinion on the nature of the liability imposed by Section 1192 of the Statutes of Kansas. The case is

Howell v. *Manglesdorf*, 33 Kan., 194.

but the only point it decides is that execution under this statute cannot be ordered against a non-resident stockholder upon a notice served outside the State. The portion of the opinion which the plaintiff in the present case relies upon and claims the Rhode Island court was under a constitutional obligation to follow, was merely a dictum. It reads as follows:

> "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

In the view of the Rhode Island court, and, it would seem, in the correct view, this dictum is not an interpretation of the statute, but a decision on general legal principles, so that the question here presented is whether the court of one State is under a constitutional obligation to follow a dictum of a court of another State, intimating the latter's view in regard to a general legal principle. Reference to a reported decision on such a question would almost seem to call for an apology, especially where the decision referred to is not by this court. The following language of the Circuit Court of the United States for the Eastern District of Missouri is, however, so apposite that it may be not out of place to quote it here.

> "It (Article IV, Section 1, of the Constitution of the United States) relates only to the conclusiveness of such judgments as between the parties to them and their privies. It does not require that judgments in one State shall be followed by the courts of other States as matter of authority in other similar cases. The Constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. It does not require the courts of one State to follow those of another upon any question whether upon the construction of local statutes or otherwise.

> There may, it is true, be cases in which a State law or decision has entered into and become part of a contract in such a way that a change of the law or a reversal of the decision would impair its obligation, but in those cases the federal question would arise, under a different provision of the Constitution. The duty of the courts of one State to follow those of another upon questions arising upon the construction of the statutes of the latter, is a duty resting alone upon comity and not one imposed by the federal Constitution."—*Per* McCrary, C. J., *Wiggins Ferry Co.* v. *Chicago etc. R. Co.*, 11 Fed. Rep., 381, 383, 384; affirmed, *Chicago etc. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S., 615.

(b) THE REFUSAL OF THE RHODE ISLAND COURT TO GIVE A KANSAS JUDGMENT AGAINST A CORPORATION, THE EFFECT OF SUPPORTING AN ACTION THEREON AGAINST A RHODE ISLAND STOCKHOLDER, IS NOT A REFUSAL TO GIVE FULL FAITH AND CREDIT TO THE JUDICIAL PROCEEDINGS OF KANSAS.

It is, no doubt, elementary that under Section 905 of the Revised Statutes of the United States, a judgment is to have, as to parties and privies, not only full faith and credit, but the same force and effect in the courts of every State which it has in the State where it was recovered. And it also seems to be well settled that stockholders in a corporation are so far privy to all proceedings against the corporation as to be bound by a judgment against it, that is to say, precluded from re-examining the merits of the claim on which the judgment was recovered.

2 Morawetz, Corporations, § 886.

Dexter v. *Edmands*, 89 Fed. Rep., 467, 471.

Hawkins v. *Glenn*, 131 U. S., 319, 329, 332.

Unless, however, the rule that a judgment is to have the same effect which it has at home, means the same effect for all purposes, the Rhode Island court was evidently not compelled by virtue of it, to give this Kansas judgment the effect of supporting an action thereon against a Rhode Island stockholder, although the judgment might have that effect in Kansas as against a Kansas stockholder.

That the rule has no such unrestricted meaning, has, of course, long been settled. It is only *as evidence*, and not for all purposes, that judgments of a court of another State are to have the same effect which they have at home.

Story, Conflict of Laws, § 609.
M'Elmoyle v. *Cohen*, 13 Peters, 312, 325, 326.
Thompson v. *Whitman*, 18 Wallace, 457, 462, 463.
Wisconsin v. *Pelican Insurance Co.*, 127 U. S., 265, 291.
Huntington v. *Attrill*, 146 U. S., 657, 685.

Accordingly "no execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments."

Story, Conflict of Laws, § 609.
Thompson v. *Whitman*, 18 Wallace, 457, 462, 463.
Wisconsin v. *Pelican Insurance Co.*, 127 U. S., 265, 291, 292.

And similarly, a judgment against a corporation in another State does not have the effect of supporting a bill in equity against stockholders to compel payment of their stock

subscriptions, although it would have that effect in the State where recovered.

National Tube Works v. *Ballou*, 146 U. S., 517.

It is hardly open to doubt, therefore, that such a judgment does not have the same effect which it has at home to the extent of compelling the court of another State, as a matter of constitutional obligation, to enforce it against a stockholder. The authorities above cited are quite sufficient to show that the Constitution and laws of the United States imposed no other obligation upon the Rhode Island court in regard to the judgment in the case at bar, than to treat it as conclusive evidence that the corporation was indebted to the plaintiff,—a point which was, of course, not disputed by the defendant. It would seem, therefore, that the judgment of the Rhode Island court does not refuse full faith and credit to the *judicial proceedings* of Kansas.

III.

The judgment of the Supreme Court of Rhode Island does not refuse to give full faith and credit to the public acts of the State of Kansas.

(*a*) IF THE KANSAS STATUTE, SET OUT IN THE DECLARATION, WAS INTENDED TO IMPOSE A LIABILITY IN A CASE LIKE THE PRESENT, THE REFUSAL OF THE RHODE ISLAND COURT TO ENFORCE IT, IS NOT A REFUSAL TO GIVE FULL FAITH AND CREDIT TO THE PUBLIC ACTS OF KANSAS.

In

Chicago etc. R. Co. v. *Wiggins Ferry Co.*, 119 U. S., 615,

this court, Mr. Chief Justice Waite delivering the opinion, said (page 622):

> "Without doubt the constitutional requirement, Art. IV, § 1, that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home."

Unless this means that the courts of one State must enforce the statutes of another, it plainly does not show that the Rhode Island court violated a constitutional obligation in refusing to enforce the Kansas statute declared on in the case at bar. It cannot be seriously contended that the words quoted have any such meaning. "These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles which they were not intended to overthrow."

Huntington v. *Attrill*, 146 U. S., 657, 685.

It has always been taken for granted that one of these established principles is the fundamental one that the statutes of a State operate extra-territorially only by the express or tacit consent of the courts in which they are sought to be enforced; and that accordingly, as the constitutional provision in question does not put the *judgments* of other States upon the footing of domestic judgments to be enforced by execution, so neither does it put the *statutes* of other States on the footing of domestic statutes which the courts must enforce as a matter of constitutional obligation. Accordingly, the cases in which

statutes like that in the case at bar, have been held unenforceable in the courts of another State, all negative by implication the existence of any constitutional obligation to enforce them. See for example:

New Haven Horse Nail Co. v. *Linden Spring Co.*, 142 Mass., 349, 353.
Post v. *Toledo etc. R. Co.*, 144 Mass., 341, 345.
Bank of North America v. *Rindge*, 154 Mass., 203.
Marshall v. *Sherman*, 148 N. Y., 9.
Fowler v. *Lampson*, 146 Ill., 472.

And among the cases where the statute here in question has been enforced in other States, none has been found in which it seems to have occured to any one that the court was not at perfect liberty to decline the jurisdiction if it saw fit to do so. The enforcement is always treated as depending upon the consent of the court and never as being a matter of constitutional obligation. See for example:

Bank of North America v. *Rindge*, 57 Fed. Rep., 279.
Rhodes v. *U. S. National Bank*, 66 Fed. Rep., 512.
M'Vickar v. *Jones*, 70 Fed. Rep., 754.
Whitman v. *National Bank*, 83 Fed. Rep., 288.
Hancock National Bank v. *Ellis*, 166 Mass., 414.

And the point has been explicitly passed upon.

Thus in

Dexter v. *Edmands*, 89 Fed. Rep., 467,

a suit in the Federal Court for the District of Massachusetts, to enforce this same statute of Kansas, Lowell, District Judge, said (pages 469, 470):

> "The laws of one sovereignty have not the force of laws, properly speaking, outside the limits of that

> sovereignty, and the rights arising by virtue of those laws are not enforceable in a court foreign to that sovereignty except through what is known as the comity of nations. . . . . The state of Massachusetts is, for the purpose of this discussion, undoubtedly a sovereignty foreign to Kansas. The courts of Massachusetts can, if they see fit, determine that this statute of Kansas is contrary to the public policy of Massachusetts and injurious to its citizens. That the courts of Massachusetts can refuse to enforce obligations arising under this statute is undoubted."

And in

Huntington v. *Attrill*, 146 U. S., 657.

Mr. Justice Gray, delivering the opinion of this court, said (page 683):

> "If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. . . . . But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it. This was directly adjudged in *Wisconsin v. Pelican Ins. Co.*, above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other."

Plainly, the only question which this leaves to be considered, is whether the suit in the case at bar is a suit on the original liability under the statute of Kansas. That it is such, seems not open to question. The judgment against the cor-

poration does not operate to make the liability of the stockholder anything else than an original liability. It is simply a necessary condition precedent to the existence of any liability on his part under this statute. The case at bar is, therefore, not a case where the original liability under the statute of another State has passed into judgment in that State, and consequently is not a case where the Constitution and laws of the United States have authorized the decision of the State court to be reviewed by this court.

(b) THE KANSAS STATUTE WAS NOT INTENDED TO IMPOSE A LIABILITY IN A CASE LIKE THE PRESENT.

This point was brought to the attention of the State court, but in the view there taken of other questions in the case, it became unnecessary to decide it. It will, however, become material in this court in case the preceding point is decided adversely to the defendant's claim; for clearly the State court did not violate a constitutional obligation in refusing to hold the defendant liable, if the statute was not intended to impose a liability in a case like the present. It therefore seems necessary to consider the point here.

The declaration alleges the recovery of judgment in Kansas against the corporation in which the defendant is a stockholder, and the return of execution unsatisfied thereon, but does not allege the recovery of judgment against the corporation in Rhode Island or that it is impossible to recover it. The question is whether such an allegation is requisite, for if it is, the case is not within the statute.

It is submitted that such an allegation is requisite. The intention of the legislature was to require the creditor to exhaust his remedy against the corporation before proceeding

against the stockholder, as appears from the provision that the stockholder may be charged only after no corporate property can be found whereon to levy execution, and this intention could be wholly defeated unless judgment and execution in the State where the stockholder was sued was required. See, upon this point, the remarks of Folger. J., in

Rocky Mountain National Bank v. *Bliss*, 89 N.Y., 342 :

> " We think the statute requires the recovery of a judgment and issue of an execution *in this State.* In requiring the creditor to exhaust his legal remedies against the corporation before resorting to the personal liability of the stockholders, the statute could not have contemplated that the recovery of a judgment and issue of an execution against the company in any State of the Union should be a compliance with the condition."

And see also,

Marshall v. *Sherman*, 148 N. Y., 9,

where the court applied this principle to the same statute declared on in the case at bar :—

> " There are numerous other decisions in the State and Federal courts that hold in effect either that such a liability cannot be enforced at all beyond the local jurisdiction, or that such an action must be in equity after all remedies against the corporation have been exhausted, and that too *in the State where the stockholder is sought to be charged*, or at least the bill must show upon its face, by proper allegations, that such a proceeding was impossible, and that all the corporate assets had been applied to the payment of the claim of creditors."—*Per* O'Brien, J., page 27.

This construction of the statute is not in conflict with the dictum in

Howell v. *Manglesdorf*, 33 Kan., 194,

relied upon by the plaintiff. It will be remembered that this dictum reads as follows:

> "While the liability is statutory, it is one which arises on the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

Even according to this dictum, the action must be brought under the statute, and a creditor who is not within the statute cannot avail himself of it. The question whether a creditor who has recovered judgment against the corporation in another State, is within the statute, was not touched upon by the court. The meaning of the dictum is merely that a creditor who is within the statute may bring an action wherever personal service upon the stockholder can be made, and the authorities above cited show that a creditor at large in Rhode Island is not within the statute any more than a creditor at large in Kansas.

The concluding averment of the declaration that the "said statute of the State of Kansas, as construed in the highest court of said State, as set forth, imposes a liability upon said defendant to the plaintiff, as above set forth," is, of course, not admitted by the demurrer.

Pearsoll v. *Dwight*, 2 Mass., 84.
Holmes v. *Broughton*, 10 Wendell, 75.
Bank v. *Hendrickson*, 40 N. J. Law, 52.

The result is, therefore, that even if the Constitution of the United States requires the Rhode Island court to enforce the statute in every case where the Kansas court would enforce it, there is nothing in this record to show that the Rhode Island court has refused to do so.

IV.

The judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted,

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